Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling Regarding	)	WC Docket No. 05-283
Self-Certification of IP-Originated Traffic	)	

REPLY COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNCIATIONS ALLIANCE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
UNITED STATES TELECOM ASSOCIATION; and the
WESTERN TELECOMMUNICATIONS ALLIANCE

Grande's *Petition*[1] should be denied as premature and unwarranted. Virtually all commenters agree with the Associations that questions related to the comprehensive regulatory treatment of Voice over Internet Protocol (VoIP) -originated traffic, including the extent to which access charges and universal service contribution obligations apply to such traffic, are before the Commission in the context of its *IP-Enabled Services* and *Intercarrier Compensation* rulemaking proceedings.[2] By asking the Commission to establish a procedure under which local exchange carriers (LECs) would be required to treat traffic delivered by interconnected competitive LECs (CLECs) as "enhanced," based solely on a naked certification by the CLEC's customer that the traffic is VoIP-originated, Grande improperly seeks to pre-judge the outcome of those proceedings.

[1] Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket No. 05-283 (Oct. 3, 2005) (*Grande Petition*).

[2] *See* IP-Enabled Services, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004)(*IP-Enabled Services NPRM*); Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005); Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation proceedings*).

The comments also confirm, contrary to Grande's basic premise, that VoIP-originated interexchange traffic that terminates on the PSTN should be assessed terminating access charges in the same manner as any other type of interexchange traffic. In the unlikely event the Commission decides to issue a ruling on this critical issue in the context of Grande's declaratory ruling petition, it should find that Grande's "certified" traffic is in fact liable for access charges, in which case Grande's petition should be dismissed as moot. Even if the Commission were disposed to establish a short-cut for determining when particular service providers are eligible for the enhanced service provider (ESP) exemption, the comments make clear Grande's proposed certification process is overbroad and unworkable, and therefore should be rejected in any event.

I. GRANDE'S PETITION IMPROPERLY SEEKS TO PRE-JUDGE THE OUTCOME OF THE COMMISSION'S IP-ENABLED SERVICES NPRM.

Commenters opposing grant of Grande's petition uniformly point out the glaring flaw underlying Grande's claims. This proceeding is not about whether CLECs should be entitled to rely on customer self-certifications as to the "enhanced" nature of particular traffic, but is instead an attempt to pre-judge one of the key issues facing the Commission in its *IP-Enabled Services Proceeding*. As Qwest points out, "[t]he force and effect of the Grande Petition is that the Commission should use the device of a certification question to resolve several extremely difficult and complex access issues that have been pending before the Commission for years."[3]

[3] Qwest at 2, *citing IP-Enabled Services NPRM*. *See also* BellSouth at 1 ("Besides being unfounded in law, Grande's petition seeks to have the Commission prejudge issues pending in the Commission's *IP-Enabled Services* proceeding.")

This point is conceded by the Joint CLEC Commenters, who assert the Grande Petition "provides an opportunity for the Commission to clarify certain aspects of the exemption from access charges applicable to enhanced service providers." As the Nebraska carriers make clear, however, "[s]uch an important issue should be addressed in a comprehensive fashion through a rulemaking proceeding, instead of addressing the question in a piecemeal fashion through a declaratory ruling."[4] In fact, the issue is at the heart of the Commission's *IP-Enabled Services* proceeding and should be resolved based on the record in that proceeding and not in response to Grande's request.

The Associations accordingly urge the Commission to deny Grande's petition, as it seeks to pre-judge the outcome of Commission's *IP-Enabled Services* proceeding. This would send a clear message that the Commission intends to address systemic problems of changing technology and intercarrier compensation in a comprehensive way and not on a piecemeal basis.

II. GRANDE'S SERVICES USE THE FACILITIES OF LOCAL EXCHANGE CARRIERS IN THE SAME MANNER AS ANY OTHER INTEREXCHANGE CARRIER'S TRAFFIC AND SHOULD THEREFORE BE LIABLE FOR ACCESS CHARGES.

Should the Commission nevertheless take the opportunity in this proceeding to rule on the key question of compensation obligations applicable to VoIP-originated traffic, it should affirm such traffic is indeed subject to access charges when it terminates on the PSTN.

Numerous commenters described how Grande's services use LEC networks in the same manner as any other interexchange carrier's (IXC's) services to terminate long-

[4] Nebraska Rural Independent Companies at 2

distance calls. As USTelecom pointed out, "[f]undamentally, the issue in this proceeding is whether LECs should retain the right to charge the same (regulated, just, and reasonable) rates for terminating IP-originated voice communications that they charge for terminating all other voice communications when the calls are delivered over the public switched network (PSTN) in precisely the same manner."[5]

Several other commenters also explain that the traffic at issue is not entitled to the ESP exemption, as Grande and its supporters claim.[6] Alltel, for example, points out the Commission's ESP exemption does not, and was never intended to, exempt service providers from paying terminating access charges for ordinary long distance voice telephone calls that originate in one transmission format (e.g., IP) and are then converted to circuit-switched format for delivery to the PSTN.[7] As Time Warner states, Grande's petition "seems to boil down to a request that voice traffic be treated differently from other voice traffic if it originates in IP. But the use of a different technology by itself cannot justify different treatment."[8]

[5] USTelecom at 3.

[6] UTEX Communications at 8, EarthLink at 3, Global Crossing at 3, Grande at 9.

[7] Alltel at 4. *See also* Cincinnati Bell at 3, Time Warner at 3-5, Verizon at 3.

[8] Time Warner at 6. Qwest suggests the Commission clarify that the ESP "exemption" is simply a regulatory decision that permits an ESP/information service provider point of presence (ISP POP) to be treated as an end-user premise for purposes of determining compensation for the use of local exchange switching facilities. Qwest at 2, 7-9. The Associations agree with respect to traffic that actually qualifies as "enhanced" under the *Computer II* ruling and subsequent orders. To the extent service providers seek to terminate basic interexchange service traffic on the PSTN, however, interstate or intrastate access charges should apply based solely on the jurisdiction of the traffic as determined by its origination and end points and not by the technology employed. Thus, for example, a voice telephone call that originates as a broadband VoIP call in California and terminates on the PSTN in New York in TDM format should pay interstate access charges regardless of whether the "ISP Node" is located in the same local calling area as the called party.

The Associations wholeheartedly agree.[9] In fact, the Commission itself has forcefully said that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network . . . ."[10]

Thus, in the unlikely event the Commission elects to consider Grande's petition on the merits, it should find that "certified" VoIP traffic is not, in fact, exempt under current law but instead is fully subject to terminating access charges. At that juncture, there would be no point in Grande's obtaining certifications from its customers and its petition would accordingly be moot.

III. EVEN IF THE COMMISSION WERE TO AGREE THAT VoIP-ORIGINATED TRAFFIC IS CURRENTLY ENTITLED TO EXEMPTION FROM ACCESS CHARGES, THE COMMISSION SHOULD NOT ADOPT GRANDE'S PROPOSAL FOR SELF-CERTIFICATION.

Even if the Commission were to agree that terminating VoIP traffic is entitled to exemption from access charges as "enhanced", the traffic certification scheme proposed by Grande runs counter to established Commission and industry billing practices and will only invite fraud and abuse.[11]

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[9] Associations' Comments at 3-4. *See also* BellSouth at 1 ("until the Commission establishes a unified regime of intercarrier compensation in its pending *Intercarrier Compensation* proceeding, the Commission must make clear that interstate access charges apply equally to all services, including [VoIP services] that use the public switched telephone network (PSTN) in the same way."); AT&T at 6 ("Moreover, the application of interstate access charges to all IP-PSTN traffic is a reasonable approach from an economic perspective.")

[10] *IP Enabled Service NPRM* at ¶¶ 61-62. Several commenters point out that Grande overlooks this critical Commission policy statement. *See e.g.,* USTelecom at 8, JSI at 2, Cincinnati Bell at 3.

[11] Cincinnati Bell at 5, Alltel at 3, Texas Statewide Telephone Cooperative at 2, Verizon at 6, AT&T at 10, USTelecom at 3-8.

Qwest points out a key flaw in Grande's proposal: even if Grande could be said to have a right to rely on certifications obtained from its customers as to the nature of the traffic they intend to route over Grande's network, there is no legal right to require other carriers, who may never deal with the certifying entities, to consider themselves bound by such certifications.[12] A LEC that receives terminating interexchange traffic from a customer has a legal obligation under the Communications Act to assess access charges in accordance with the terms of its tariff.[13]

The same obligations apply to any other LEC terminating such traffic at a later point in the chain. The fact that the initial LEC elects to rely on a certification from its customers regarding the nature of that traffic provides no basis for requiring other LECs to rely on such certifications.[14]

While changes in markets and technology have complicated the analysis, the importance of correctly identifying the jurisdiction of calls for pricing purposes has remained the same as it was twenty or more years ago. Historically, a key issue for accurate call rating was whether a long distance carrier had properly reported its percentage interstate usage ("PIU") factor. Unless measurement was possible by the terminating LEC, a reasonably accurate PIU factor proffered by one or the other carrier

[12] Qwest at 4.

[13] AT&T at 14. Alltel (at 6) likewise demonstrates it has abided by its lawful intrastate and interstate access tariffs by using the originating and terminating telephone numbers supplied by Grande to determine the jurisdiction and proper billing of calls for termination of Grande's non-local calls. Alltel further indicates its Interconnection Agreement with Grande specifically provides that the classification of Grande's traffic for intercarrier compensation purposes would be governed by the terms of the agreement and is not affected by Grande's relationships with supposed ISPs.

[14] Qwest at 4.

would be applied, but was generally made subject to audit.[15] The FCC has not required LECs to accept other carriers' PIU reports without any possibility of verification or audit to ensure accuracy.

AT&T explains that Grande's self-certification scheme is flawed in other ways as well. For example, while Grande claims its certifications demonstrate that traffic routed to the downstream LEC is "enhanced", the language of the proposed certification form is ambiguous and might be interpreted to include "IP-in-the-middle" traffic, which the Commission has explicitly found to be subject to access charges.[16] AT&T also notes the "actual knowledge" standard proposed by Grande would, if adopted, create perverse incentives for carriers like Grande to avoid diligent inquiry as to the nature of customer traffic, at the expense of downstream LECs forced to accept such traffic as local under the proposed certification scheme.[17] AT&T also explains that the procedure Grande seeks to implement would effect a change in Commission rules governing computation and assessment of access charges, and thus should be undertaken, if at all, in the context of a rulemaking proceeding.[18]

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[15] *See generally,* Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, *Recommended Decision & Order*, 4 FCC Rcd 1966 (1988) (*PIU Recommended Decision*); Determination of Interstate and Intrastate Usage of Feature A and Feature B Access Services, *Memorandum Opinion & Order*, 4 FCC Rcd 8448 (1989) (*PIU Order*). The Joint Board recommended that LECs be permitted to adopt reasonable PIU verification and audit requirements in their interstate tariffs. *PIU Recommended Decision*, at ¶74. The recommendation also included a one-year record retention requirement. *Id.*, at ¶76. These recommendations were then adopted by the FCC. *PIU Order*, at ¶¶13 *et seq.* Exchange Carrier access tariffs continue to include provisions relating to audit and verification of PIU reports submitted by IXC customers. *See, e.g.*, NECA tariff provisions on PIU report verification in Section 2.3.11(C)(3) and (4) of the NECA Tariff.

[16] AT&T at 10.

[17] *Id.*

[18] *Id.* at 14-15.

Finally, the Associations agree with CenturyTel that Grande's proposed self-certification scheme will only encourage uneconomic regulatory arbitrage and would likely be administratively unworkable, as terminating carriers attempt to deal with potentially thousands of customer-by-customer certifications delivered by connecting carriers. This is a particular concern for rural carriers that typically do not have direct connections with the CLECs that would be submitting such certifications, and would therefore need to obtain copies and establish complex record-keeping mechanisms in cooperation with transiting tandem providers as well as submitting CLECs. More importantly as Texas Statewide Telephone Cooperative aptly points out, the certifications Grande proposes to supply are unauditable.[19] Unlike PIU reports, there is no way for a LEC or anyone else to verify whether a call claimed to have been originated as a "VoIP call" actually was initiated over a broadband connection in IP format. Validation and auditing would be especially difficult, in any event, for rural ILECs who are often at the end of a chain of several carriers transporting calls to their destinations.

IV. CONCLUSION

Grande's Petition should be denied in its entirety. As virtually all parties in addition to the Associations explain, the declaratory ruling proposed by Grande would, if adopted, pre-judge critical issues under consideration in the Commission's *IP-Enabled Services* proceeding. The question of whether access charges should apply to VoIP-originated interexchange traffic should considered in a comprehensive rulemaking proceeding and not decided in a piecemeal fashion through declaratory rulings. Finally,

[19] Texas Statewide Telephone Cooperative at 3; *See also* Cincinnati Bell at 5, and AT&T at 13.

Grande's proposed certification scheme has been shown to be unworkable. Rather than risk creating additional opportunities for regulatory arbitrage, if not regulatory chaos, by issuing the requested declaratory ruling, the Commission should focus its energies on resolving fundamental questions of how IP-enabled services should be treated for intercarrier compensation and universal service contribution purposes in proceedings specifically initiated for these purposes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy the Associations' Reply Comments was served this 11th day of January 2006, by electronic filing and e-mail to the persons listed below.

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